MALAYAN CEMENT INDUSTRIES SDN BHD v. GOLDEN ISLAND SHIPPING (L) BHD

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
MOHD ZAWAWI SALLEH JCA
PRASAD SANDOSHAM ABRAHAM JCA
[CIVIL APPEAL NO: P-02-2668-11-2012]
29 MAY 2017

CONTRACT: *Agreement – Breach – Damages – Breach of supply agreement – Liquidated damages provided for in agreement – Measure of damages – Whether losses and damages must be proved – Whether damages must be mitigated – Whether claimant only entitled to nominal damages – Whether claimant had burden to prove loss and mitigate losses where parties had stipulated damages in event of breach of agreement – Contracts Act 1950, ss. 74 & 75*

The respondent ('the plaintiff') was a supplier of iron ore while the appellant ('the defendant'), a cement manufacturer, used the said iron ore in its manufacturing process. The parties entered into an agreement where it was agreed that (i) 60,000 metric tonnes ('mt') of iron ore were to be supplied to the defendant at a price of RM44.50 per mt; and (ii) the defendant shall place a monthly requirement of no less than 4,000mt. However, the defendant later failed to take delivery of 14,311mt of iron ore supplied by the plaintiff. At the High Court, the plaintiff claimed against the defendant for a lump sump of RM636,839.50 being the value of the shortfall of 14,311mt calculated at RM44.50 per mt. In allowing the claim, the Judicial Commissioner ('the JC') was of the opinion that the issue of proving actual loss and failure to mitigate damages were a non-issue since liquidated damages were provided for in cl. 13 of the agreement. Hence the present appeal. The defendant submitted that the general law as to the measure of damages or compensation for a breach of contract is provided under s. 74 of the Contracts Act 1950 ('the Act'). The section requires the plaintiff to prove its loss and in the absence of such proof, he would only be entitled to nominal damages. The plaintiff argued that since liquidated damages were provided for in the said agreement, it was not obligated to prove its loss and as a corollary to that, to mitigate its losses.

Held (allowing appeal and setting aside decision of High Court)
Per Mohd Zawawi Salleh JCA delivering the judgment of the court:

(1) Section 74 of the Act makes it clear that compensation is not to be given for any remote or indirect loss or damage sustained by reason of the breach. The underlying principle in this section is that a mere breach of contract by a defaulting party would not entitle the other side to claim for damages unless the said party had in fact suffered damages because

of such breach. Loss and damages which was actually suffered as a result of breach had to be proved and the plaintiff was to be compensated to the extent of actual loss or damage suffered. For a claim of liquidated damages under s. 75 of the Act, the words 'whether or not actual damage of loss is proved to have been caused thereby' could not be relied upon to dispense with proof. (paras 16 & 27)

(2) Despite the words in s. 75 of the Act, Malaysian courts have construed the wording in that section to mean that a party would still be under an obligation to prove and mitigate its losses. Therefore, the JC fell into serious error in holding that in view of cl. 13 of the said agreement, the issue of proof of loss and as a corollary to that, to mitigate his losses was a non-issue. The loss was as a result of the shortfall in quality of iron ore which the defendant had agreed to purchase from the plaintiff. Therefore, the loss could be measured in term of money. (paras 29 & 31)

Bahasa Malaysia *Headnotes*

Responden ('plaintif') adalah pembekal bijih besi manakala perayu (defendan'), pengilang simen, menggunakan bijih besi tersebut dalam proses pengilangannya. Pihak-pihak memeterai satu perjanjian dan bersetuju agar (i) 60,000 tan metrik ('mt') bijih besi akan dibekalkan kepada defendan pada harga RM44.50 per mt; dan (ii) defendan akan membuat tempahan keperluan bulanan tidak kurang 4,000mt. Walau bagaimanapun, defendan kemudian gagal mengambil hantaran 14,311mt bijih besi yang dibekalkan oleh plaintif. Di Mahkamah Tinggi, plaintif menuntut terhadap defendan jumlah sekali gus sebanyak RM636,839.50 iaitu nilai kurangan 14,311mt yang dikira pada RM44.50 per mt. Dalam membenarkan tuntutan, Pesuruhjaya Kehakiman ('PK') berpendapat isu membuktikan kerugian sebenar dan kegagalan memitigasi ganti rugi bukan satu isu kerana ganti rugi jumlah tertentu diperuntukkan dalam kl. 13 perjanjian. Maka timbul rayuan ini. Defendan menghujahkan bahawa undang-undang am berkenaan ukuran ganti rugi atau pampasan diperuntukkan bawah s. 74 Akta Kontrak 1950 ('Akta'). Seksyen ini mengkehendaki plaintif membuktikan kerugiannya dan tanpa pembuktian sedemikian, plaintif hanya berhak mendapat ganti rugi nominal. Plaintif mendalihkan bahawa memandangkan ganti rugi jumlah tertentu sudah diperuntukkan dalam perjanjian tersebut, plaintif tidak berkewajipan membuktikan kerugiannya dan ekoran itu, memitigasi kerugiannya.

Diputuskan (membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi)

Oleh Mohd Zawawi Salleh HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 74 Akta jelas memperuntukkan bahawa pampasan tidak diberi bagi kerugian atau kerosakan terasing atau tidak langsung yang terjadi akibat pelanggaran. Prinsip tersirat dalam seksyen ini adalah

pelanggaran kontrak semata-mata oleh pihak yang melanggar tidak akan memberi hak buat pihak satu lagi untuk menuntut ganti rugi kecuali jika pihak itu sebenarnya telah mengalami kerugian akibat pelanggaran tersebut. Kerugian dan kerosakan sebenarnya yang dialami akibat pelanggaran perlu dibuktikan dan plaintif perlu dipampas setakat kerugian atau kerosakan sebenarnya yang dialami. Bagi tuntutan ganti rugi jumlah tertentu bawah s. 75 Akta, perkataan-perkataan 'sama ada kerosakan sebenarnya ataupun kerugian yang disebabkan olehnya telah dibuktikan atau tidak' tidak boleh dijadikan sandaran untuk tidak memerlukan bukti.

(2) Meskipun s. 75 Akta memperuntukkan sedemikian, mahkamah Malaysia mentafsirkan perkataan-perkataan dalam seksyen tersebut sebagai satu-satu pihak masih berkewajipan membuktikan dan memitigasi kerugiannya. Oleh itu, PK terkhilaf secara serius dalam memutuskan berdasarkan kl. 13 perjanjian tersebut, isu pembuktian kerugian dan susulan itu, mitigasi kerugian, tidak menjadi isu. Kerugian berakibat daripada kurangnya kualiti bijih besi yang defendan setuju beli daripada plaintif. Oleh itu, kerugian ini boleh diukur dengan wang.

Case(s) referred to:
AMEV-UDC Finance Ltd v. Austin [1986] 162 CLR 170 ***(refd)***
Dunlop Pneumatic Tyre Co Ltd v. New Garage & Motor Co Ltd [1915] AC 79 ***(refd)***
Hadley v. Baxendale [1854] 9 Ex 341 ***(refd)***
Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd [2009] 4 CLJ 569 FC ***(refd)***
Joo Leong Timber Merchant v. Dr Jaswant Singh Jagat Singh [2003] 5 CLJ 286 HC ***(refd)***
Kabatasan Timber Extraction Co v. Chong Fah Shing [1969] 1 LNS 63 FC ***(refd)***
Koh Siak Poo v. Perkayuan OKS Sdn Bhd & Ors [1989] 1 LNS 194 SC ***(refd)***
Malaysian Rubber Development Corporation Bhd v. Glove Seal Sdn Bhd [1994] 4 CLJ 783 SC ***(refd)***
Maula Bux v. Union of India [1969] 2 SCC 554 ***(refd)***
Michael C-Solle v. United Malayan Banking Corporation Bhd [1984] 1 CLJ 151; [1984] 1 CLJ (Rep) 267 FC ***(refd)***
Selva Kumar Murugiah v. Thiagarajah Retnasamy [1995] 2 CLJ 374 FC ***(refd)***
WT Malouf Pty Ltd v. Brinds Ltd [1981] 52 FLR 442 ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 74, 75

For the appellant - Michael Chow & CH Cheong; M/s Michael Chai & Co
For the respondent - Harpal Singh Gill; M/s Harpal Singh & Co

[Editor's note: Appeal from High Court, Pulau Pinang; Civil Appeal No: MT4-22-410-2005 (overruled).]

Reported by Najib Tamby

A

JUDGMENT

Mohd Zawawi Salleh JCA:

Introduction

B **[1]** This appeal turns on a very short and narrow compass, namely, whether the plaintiff (the appellant herein) has the burden to prove its loss and as a corollary to that, to mitigate its losses where the parties have stipulated liquidated damages in the event of breach in the agreement.

[2] For convenience, in this judgment, the parties will be referred to as they were in the High Court.

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Brief Factual Background

[3] The relevant factual background giving rise to this appeal may be briefly stated as follows:

D (a) The plaintiff is a supplier of iron ore. The defendant is a company which manufactures cement and uses iron ore in its manufacturing process.

(b) *Vide* an agreement dated 1 April 2004 between the plaintiff and the defendant ("the said agreement"), the plaintiff had agreed to supply an approximate total of 60,000 metric tonnes of iron ore to the defendant E from 1 January 2004 to 31 December 2004 at a price of RM44.50 per metric tonnes and that the defendant shall place a monthly requirement of not less than 4,000 metric tonnes.

(c) The defendant had in breach of the said agreement failed to take delivery of the total of 14,311 metric tonnes of iron ore supplied by the plaintiff.

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(d) Clause 4.2 of the said agreement provides for the price to be fixed at RM44.50 per metric tonnes and cl. 13 reads:

> The Company shall and hereby undertakes to purchase from the supplier a minimum quantity of not less than 48,000 mt per annum (i.e. A minimum of 4,000 mt per month) failing which the Company G shall pay the Supplier the shortfall thereof in any event.

(e) The plaintiff's claim against the defendant is therefore calculated as follows:

14,311 x RM44.50 = RM636,839.50

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(f) In other words, the plaintiff's claim against the defendant is for a lump of RM636,839.50 being the value of the shortfall of 14,311 metric tonnes of iron ore calculated at the price of RM44.50 per metric tonnes.

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(g) At the end of trial, the learned Judicial Commissioner ("learned JC") (as he then was) allowed the amount claimed by the plaintiff (RM636,839.50) with interest at the rate of 4% per annum from the date of filing of the writ to the date of realisation and costs of RM20,000.

(h) Being aggrieved with the said decision, the defendant appealed to this court.

Findings Of The Learned JC

[4] The fulcrum of the learned JC's reasoning in allowing the plaintiff's claim is to be found in the following passages in his grounds of judgment:

> On the contention of the Defendant in submission that there was no evidence of loss and mitigation of loss, I find this to be non-issue since parties have agreed and covenanted contractually that the shortfall arising from the inability of the Defendant to take up the agreed minimum quantity of the iron ore pursuant to Clauses 1, 1.1, 4 and 13 shall be the basis of the loss or damage to the Plaintiff and pursuant to Clause 13 that the Defendant has unconditionally agreed that the Defendant shall pay to the plaintiff the shortfall thereof in any event, liquidated damage or loss has been determined by the parties within the said agreement itself. This Court must give effect to what the parties have so intended. I do not find merit in this argument,
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> (See Additional Appeal Record at page 16).

Parties Competing's Submissions

[5] The focus of criticism which learned counsel for the defendant directs to the decision of the learned JC is that His Lordship was in error in holding that the issue of proving actual loss and failure to mitigate damages were a "non-issue" since liquidated damages were provided for in cl. 13 of the said agreement.

[6] Learned counsel posited that the law is clear that the plaintiff, notwithstanding cl. 13 of the said agreement, must still prove its loss and as a corollary to that principle, the plaintiff must mitigate its loss.

[7] Learned counsel further submitted that the general law as to the measure of damages or compensation for a breach of contract is provided under s. 74 of the Contracts Act 1950 ("Act 136"). Simply put, the section requires the plaintiff to prove its loss and in the absence of such proof, he would only be entitled to nominal damages. Underpinning the principle is the overriding obligation of party to mitigate their losses.

[8] In support of his submission, reliance was placed on the decision of the Supreme Court in the *Malaysian Rubber Development Corporation Berhad v. Glove Seal Sdn Bhd* [1994] 4 CLJ 783; [1994] 3 MLJ 569.

[9] In reply, learned counsel for the plaintiff submitted that the said agreement makes it mandatory for the defendant to purchase from the plaintiff a minimum of 4,000 metric tonnes of iron ore per month. It also makes it compulsory for the defendant to compensate the plaintiff for the shortfall thereof in any event should there be a default by the defendant.

[10] It is the contention of learned counsel for the plaintiff that since liquidated damages were provided for in the said agreement, there was no obligation on the part of the plaintiff to prove its loss and as a corollary to that, to mitigate its losses.

[11] Learned counsel further submitted that the terms of the said agreement are very clear in their words and meaning and the court ought to give effect to what the parties have agreed upon. (See *Michael C-Solle v. United Malayan Banking Corporation Bhd* [1984] 1 CLJ 151; [1984] 1 CLJ (Rep) 267 at p. 208, *Koh Siak Poo v. Perkayuan OKS Sdn Bhd & Ors* [1989] 1 LNS 194; [1989] 3 MLJ 164).

Discussion And Decision

[12] At the outset, it must be recognised that there are a number of advantages to the inclusion of a liquidated damages clause in a contract. Among significant advantages are: a liquidated damages clause permits the parties to enter into a contractual relationship with a better understanding of their respective rights and obligations in the event of breach and can eliminate the cost and delay of a complex lost-profits analysis if the relationship breaks down.

[13] In *AMEV-UDC Finance Limited v. Austin* [1986] 162 CLR 170, Mason and Wilson JJ said at pp. 193-194:

> Instead of pursuing a policy of restricting parties to the amount of damages which would be awarded under the general law or developing a new law of compensation for plaintiffs who seek to enforce a penalty clause, the courts should give the parties greater latitude to determine the terms of their contract. In the case of provisions for agreed compensation and, perhaps, provisions limiting liability, that latitude is mutually beneficial to the parties. It makes for greater certainty by allowing the parties to determine more precisely their rights and liabilities consequent upon breach or termination, and thus enables them to provide for compensation in situations where loss may be difficult or impossible to quantify or, if quantifiable, may not be recoverable at common law. And they may do so in a way that avoids costly and time-consuming litigation.

[14] Construction contracts frequently contain "liquidated damages" clause in favour of the owner. (See for example, cl. 40 of PWD Forms 203A (Rev 10/83) and cl. 22 of PAM 98). Typically, the clause provides a provision of "damages for non-completion". Briefly, the provision indicates

that in the event of late completion, the contractor shall pay to the employer the LAD specified amount per day of delay until the completion date. The employer may deduct such sum from any monies payable to the contractor under this contract. In addition, the LAD is considered as the actual loss that will be suffered in breach of contract and the contractor agrees to pay the said sum without the need of proving damages by the employer.

[15] Statutory provisions for compensation for damages by breach of contract and liquidated damages in Malaysia are found in ss. 74 and 75 of Act 136:

> 74. Compensation for loss or damage caused by breach of contract.
>
> (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
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> (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.
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> Compensation for failure to discharge obligation resembling those created by contract.
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> (3) When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default as if the person had contracted to discharge it and had broken his contract.
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> 75. Compensation for breach of contract where penalty stipulated for.
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> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

[16] Section 74 makes it clear that compensation is not to be given for any remote or indirect loss or damage sustained by reason of the breach. The underlying principle in this section is that a mere breach of contract by a defaulting party would not entitle the other side to claim damages unless the said party has in fact suffered damages because of such breach. Loss and damages which is actually suffered as a result of breach has to be proved and the plaintiff is to be compensated to the extent of actual loss or damage suffered.

[17] Concerning s. 75 of Act 136, the Federal Court in *Selva Kumar Murugiah v. Thiagarajah Retnasamy* [1995] 2 CLJ 374; [1995] 1 MLJ 817, held that the employer is required to prove his actual loss suffered in accordance with the general principles of proof of damages. The Federal Court, in interpreting s. 75, held that the plaintiff who is claiming for actual damages in an action for breach of contract must still prove the actual damages or reasonable compensation in accordance with the settled principles in the English landmark case of *Hadley v. Baxendale* [1854] 9 Ex 341. Any failure to prove such damages will result in the refusal of the court to award such damages. Section 75 of Act 136 provides an instance in which Malaysian law departs significantly from the line of English common law.

[18] Under common law, a liquidated damages clause must comply with the 'penalty' principle establish by Lord Dunedin in the landmark case of *Dunlop Pneumatic Tyre Co Ltd v. New Garage & Motor Co Ltd* [1915] AC 79, that:

> The essence of liquidated damages is a genuine covenanted pre-estimate of loss.

[19] What is meant by the term 'genuine pre-estimate' was further explained in *WT Malouf Pty Ltd v. Brinds Ltd* [1981] 52 FLR 442 as:

> A genuine pre-estimate means a pre-estimate which is objectively of that character: that is to say, a figure which may properly be called so in the light of the contract and the inherent circumstances. It will not be enough merely that the parties honestly believed it to be so.

[20] The courts in Malaysia have concluded that the distinction between liquidated damages and penalties does not apply, the situation being governed by s. 75 of Act 136 which has been held to have erased this distinction.

[21] In addition, there is a general duty requiring that reasonable steps to be taken to mitigate losses flowing a breach particularly in the case of anticipatory breach. The party who has failed to mitigate the losses cannot later recover any such loss flowing from his neglect. This is a long-established principle applied in *Kabatasan Timber Extraction Co v. Chong Fah Shing* [1969] 1 LNS 63; [1969] 2 MLJ 6. The Federal Court held that it was the duty of the respondent to take reasonable steps to mitigate the damages caused by the appellant when he failed to deliver logs to the mill but left them some 500 feet away. This principle also applied in *Joo Leong Timber Merchant v. Dr Jaswant Singh Jagat Singh* [2003] 5 CLJ 286; [2003] 5 MLJ 116. The respondent counterclaimed for loss of rental income against

appellant's claim for the balance sum due for the completed building works was dismissed by the High Court due to respondent's failure to show that he had taken all reasonable steps to mitigate his damage.

[22] In *Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd* [2009] 4 CLJ 569, the Federal Court was asked to review its earlier decision in the case of *Selva Kumar a/p Murugiah (supra)*. The appellant obtained leave to the Federal Court on the following two questions:

(1) Whether that part of the decision in *Selva Kumar a/l Murugiah v. Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 which obliges a party having the benefit of a liquidated damages clause to prove its losses, notwithstanding the words in Section 75 of the Contracts Act 1950 'whether or not actual damage or loss is proved to have been caused thereby', is correct?

(2) Whether or not parties entering into a contract are entitled to contract out of the provisions of Section 75 of the Contracts Act 1950?.

[23] The Federal Court dismissed the appeal by a majority of 2 - 1. The majority (Per Arifin Zakaria CJ (Malaya)(as he then was) & Alaudin Sheriff PCA concurring) reaffirmed the principles set out by the Federal Court in *Selva Kumar a/l Murugiah (supra)*, namely:

(a) The words in s. 75 of Act 136 "whether or not actual damage or loss is proved to have been caused thereby" must be given a restricted construction. Thus, a party who is claiming for damages in an action for breach of contract must still produce evidence to prove the actual loss or the reasonable compensation. Any failure to prove such loss will result in the refusal of the court to award such damages.

(b) However, for cases where the court finds it difficult to assess damages for the actual damage as there is no known measure of damages employable, and yet the evidence clearly shows some real loss inherently which is not too remote, the stipulated sum may be recoverable. The court ought to award substantial damages as opposed to nominal damages which are reasonable and fair according to the court's good sense and fair play. In any event, the damages awarded must not exceed the sum so named in the contractual provision.

[24] Based on the foregoing reasons, the majority answered the first question in the affirmative. The majority did not answer the second question as they opined that there was no clear provision in the agreements which excluded the application of s. 75 of Act 136.

[25] The minority (Per Hashim Yusof FCJ (dissenting)) held as follows:

A (a) The monies were rightly forfeited by the appellant, being an amount that was reasonable in view of the nature of the project and its abandonment by the respondent three years after the agreements were signed. Although proof of loss and damages could be given, it would be a very lengthy process. It was to avoid this lengthy process that the parties
B agreed on a stipulated sum in the event of a breach. It could not be the case that the innocent party would be the one to have to prove the loss.

(b) The parties had expressly agreed and named the sums payable in case of breach as reasonable compensation to the non-defaulting party. The parties further waived any objection thereafter that those sums would be
C otherwise than fair or reasonable compensation. Such stipulation was not contrary to s. 75 of Act 136.

[26] As such, the appellant was entitled to receive from the respondent reasonable compensation not exceeding the sum so named in the agreements, whether or not actual damage or loss is proved to have been caused thereby.
D Thus, the minority answered the first question in the negative and the second question, positive.

[27] As the law stands now, for a claim of liquidated damages under s. 75 of the Act 136, the words "whether or not actual damage or loss is proved
E to have been caused thereby" cannot be relied upon to dispense with proof. The plaintiff is totally not entitled to recover his loss if he failed in taking the duty of mitigation.

[28] With these principles in the forefront of our minds, we now proceed to consider the issue posed for our consideration.

F **[29]** With respect, we are of the opinion that the learned JC fell into serious error in holding that in view of cl. 13 of the said agreement, the issue of proof of loss and as a corollary to that, to mitigate his losses was a "non-issue". As we have alluded to earlier, despite the words "whether or not actual damage or loss is proved to have been caused thereby" contains in s. 74, the
G Malaysian courts have construed the wording in that section to mean that a party would still be under an obligation to prove its loss and to mitigate its losses.

[30] We also would like to refer the case of *Maula Bux v. Union of India* [1969] 2 SCC 554. In this case, a Division Bench of the Delhi High Court
H had upheld the finding of a single judge who had set aside the arbitral award on the ground that the liquidated damages had been made even though no evidence had been led to prove any loss or damages. The court stated:

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> It is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree, and the court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But the expression "whether or not actual damage or loss is proved to have been caused thereby" is intended to cover different classes of contracts which come before the Courts. In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established Rules. Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him.

[31] In this instant appeal, it is not disputed that the loss is as a result of the shortfall in quality of iron ore which the defendant had agreed to purchase from the plaintiff. Therefore, the loss can be measured in term of money. In fact, the learned JC had allowed the plaintiff's claim in sum of RM636,839.50.

[32] In this instant appeal, PW1 in his witness statement had boldly proclaimed that the plaintiff was not obliged to mitigate its loss. This bold statement goes against the judgment of the Court of Appeal given on 1 March 2011 when allowing the defendant's appeal against the decision of the High Court in entering summary judgment against the defendant in favour of the plaintiff. That judgment identified two issues for trial:

(i) whether the plaintiff had breached the said agreement; and

(ii) whether the plaintiff had mitigated its losses.

[33] The evidence on record also shows that the plaintiff was a middleman sourcing supplies from third parties. The law is clear that the plaintiff, notwithstanding cl. 13 of the said agreement, must still prove its loss and as a corollary to that principle, the plaintiff must mitigate its losses.

Conclusion

[34] For the foregoing reasons, we must answer the question posed in the affirmative. Consequently, we allow the appeal and set aside the decision of the learned JC with costs of RM30,000. So ordered.